Supreme Court, U. S.
FILED
MAY 18 1977
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1199

SOUTH CAROLINA REAL ESTATE COMMISSION,
RESPONDENT,

versus

R. TRIPPETT BOINEAU, PETITIONER

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF SOUTH CAROLINA

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The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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OPINIONS BELOW

The opinion of the South Carolina Supreme Court is reported at . . . S. C. . . ., 230 S. E. (2d) 440 and is set forth in the Petitioner's Appendix at p. 15. The opinion of the Court of Common Pleas for Richland County is unreported and is set forth in Petitioner's Appendix at p. 21.

JURISDICTION

The constitutional question raised here was not properly before the South Carolina Supreme Court for determination there. An adequate nonfederal basis exists on which this decision rests. This Court, therefore, lacks subject matter jurisdiction of the petition for certiorari.

QUESTION PRESENTED

Whether, on the merits, Petitioner received due process of law and a fair trial, in that his real estate broker's license was revoked pursuant to fact findings which were fairly embraced by the notice of charges against Petitioner.

CONSTITUTIONAL PROVISION INVOLVED

Respondent does not question that, if any, Section 1 of the Fourteenth Amendment to the Constitution of the United States, is the constitutional provision involved.

STATEMENT OF CASE

Certain written charges were made against Petitioner by the South Carolina Real Estate Commission which held an administrative hearing to determine whether Petitioner's Real Estate Broker's license should be revoked. From an adverse ruling by the Commission, the Petitioner appealed to the Court of Common Pleas, where, pursuant to Section 56-1545.21, *S. C. Code of Laws* (1976 Supp.), the matter was tried *de novo* as an equity matter without a jury.

On January 13, 1976 the Court of Common Pleas issued an order finding Petitioner guilty of misconduct with respect to four separate transactions and ordering the Petitioner's Real Estate Broker's license to be revoked.

Petitioner asserts, in his statement of case, that "with respect to each" of the four transactions involved, the Trial Judge found the Petitioner guilty of conduct with which the Petitioner asserts that he had neither been charged nor given notice or opportunity to defend. This is materially inaccurate, by Petitioner's own admission. The contradiction occurs on page 8 of the petition for certiorari in the second full paragraph, where Petitioner

asserts "With respect to the Ingram transaction, Petitioner does not contend that the Trial Court exceeded the charges against him *per se* . . ."

Respondent contends constitutionally adequate notice was given Petitioner, as to all charges.

Petitioner took a timely appeal to the Supreme Court of South Carolina which issued an order on November 8, 1976 affirming the judgment of the Court of Common Pleas. The South Carolina Supreme Court found that the findings and conclusions of the lower court were supported by clear and convincing evidence. *South Carolina Real Estate Commission v. Boineau,* ... S. C. ..., 230 S. E. 2d 442 (1976). A timely Petition for Rehearing was filed and was denied by the Supreme Court on December 2, 1976. Respondent does not contest the timeliness of the petition for writ of certiorari.

THE FEDERAL CONSTITUTIONAL QUESTION WAS NOT PROPERLY PRESENTED TO THE SOUTH CAROLINA SUPREME COURT FOR DECISION

Admittedly, the question of findings of fact exceeding the charges in the Notice of Hearing was raised by counsel at all appropriate stages. But in no wise was the South Carolina Supreme Court called upon to consider the alleged error of the Trial Court, in the light of federal constitutional standards. "Every ground of appeal ought to be so distinctly stated that the Court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue. The object of an exception is to present some **distinct principle or question of law** which appellant claims was violated by the Trial Court." *Boyer v. Laughton-Woodward, Inc.,* 247 S. C. 167, 146 S. E. 2d 606 (1966). [Emphasis supplied.] Where the decision of the South Carolina Supreme Court as to a

federal constitutional matter is sought, the fact that a decision in federal constitutional terms is desired should be specifically called to the Court's attention. The appeal should not leave the issue to inference or innuendo.

The Petition for rehearing alleged misapprehension by the State Supreme Court of the due process issue. But the Court can not misapprehend that which was not called to its attention in the original appeal. cf. *Arnold v. Carolina Power and Light Company,* 168 S. C. 163, 176 S. E. 234 (1933).

Furthermore, the issue of whether Petitioner received a fair trial in accordance with his federal constitutional rights was raised for the first time in the Petition for Certiorari. It is submitted that the federal question was never properly framed or presented to the South Carolina Supreme Court for decision, and that said State Supreme Court is not required to guess or infer that a federal constitutional question is before it for decision. See Appendix A, Questions Presented in Petitioner's Brief in the State Supreme Court, as well as Exceptions cited in the Petition for Certiorari, at p. 36.

ARGUMENT

The South Carolina Real Estate Commission, in opposition to the Petition for a Writ of Certiorari in this matter, respectfully submits the following:

I

This Court need not review the fact findings in every case tried across the land.

The thrust of Petitioner's argument is that the findings of fact in his trial exceeded the charges against him. A unanimous Supreme Court of South Carolina has stated, in effect, that except for the clarification that real estate brokers may be deprived of their licenses for conduct not

specifically related to the practice of brokering real estate, that it would dismiss the appeal under Rule 23 of its Rules of Practice. *South Carolina Real Estate Commission v. Boineau,* ... S. C. ..., 230 S. E. (2d), 441 (1976). This indicates that all the Justices of the Court conclude that the grounds of the appeal are manifestly without merit. *Rules of Practice of the South Carolina Supreme Court,* Rule 23.

Under these circumstances, Petitioner is asking the United States Supreme Court to get into the business of reviewing the fact findings in every case to see if the facts found exceed the charges made. Petitioner would have this Court undertake a chapter and verse review of every charge made and every fact found in every trial court to determine if the former exceed the latter. It is submitted that this function is properly that of the state appellate courts. This Court should not undertake a plenary review of the charges and fact findings in every case where, somewhat as an afterthought, Petitioner alleges that he was denied a fair trial and due process of law.

This case has minimal precedental value for the guidance of other courts. Respondent concedes the legal point that Petitioner was entitled to due process of law and a fair trial. It contends that, on the facts, Petitioner received same. In a Utopia, no doubt there would exist a super court to review all lower appellate court reviews, of trial court fact finding. But it is submitted that the exigencies of this Court's business preclude such review here.

II

This Court lacks jurisdiction of the subject matter in this case, in that the decision rests upon an adequate non-federal ground.

It is well recognized that this Court will not take jurisdiction of a case which rests upon an adequate non-

federal ground. *Ellis v. Dixon,* 349 U. S. 458, 75 S. Ct., 850, 99 L. Ed. 1231 (1955).

With regard to the "Ingram" transaction, in the Petition for Certiorari at page 8, Petitioner concedes that he had adequate notice of the charges, effectively conceding his constitutional argument. He then "questions" whether the alleged improper fact finding on other counts somehow "tainted" the fact finding in the Ingram transaction. No further evidence or argument is adduced in support of this proposition. Even assuming arguendo, the accuracy of Petitioner's allegations relative to the Smith, Riser, and Lake Dogwood transactions, there has been no showing of "taint" whatsoever, in this independent Ingram transaction.

Petitioner further alleges that the Trial Court's failure to apply the parol evidence rule and the Statute of Frauds amounted to a denial of federal due process of law. The short answer is that no federal constitutional question with regard to the State's parol evidence and Statute of Frauds rules was raised prior to the Petition for Certiorari, and thus was not presented to the State Supreme Court for review other than as a question of state evidence law. Therefore these questions are not properly before this Court.

Furthermore, as a matter of state law, it was proper for the Trial Court not to invoke such rules, since fraud, and not the terms of a contract, was at issue and the Statute of Frauds is not applied by South Carolina to conceal a fraud. *Florence Printing v. Parnell,* 178 S. C. 119, 182 S. E. 313 (1934); *Gardner v. Nash,* 225 S. C. 303, 82 S. E. 2d 123 (1954). Similarly, when fraud is charged, parol evidence is admissible to prove fraud, even though such testimony tended to vary the terms of a written instrument, when it is alleged that such instrument was procured as a result of the fraud charged. When fraud is

charged, much leeway is allowed in the admission of evidence on that issue. *Allen-Parker Co. v. Lollis,* 257 S. C. 266, 185 S. E. 2d 739 (1971).

There was no arbitrary violation of the state's evidence law. Further, any "arbitrariness" which amounted to a denial of due process was not called to the attention of the State Supreme Court in any manner. Thus, it is not properly before this Court.

The Ingram transaction alone constitutes an adequate state basis for decision. The objections that the other fact findings "taint" this one and that there was an arbitrary ignoring of state evidentiary rules, are essentially without merit. The Writ should be denied on the basis of this finding alone.

III

Petitioner was not denied due process of law, nor a fair trial, inasmuch as he was found guilty of misconduct of which he had specific notice, based on clear and convincing evidence.

Respondent agrees with the principle that adequate notice of charges is constitutionally mandated in this, as in every case. Respondent contends that Petitioner was found in violation of the law on specified charges which were supported by clear and convincing evidence, *Boineau, Supra,* at 442 and particularly set forth in the Trial Court's findings.

Petitioner was found to have violated the real estate licensing law with regard to four (4) separate transactions, referred to as the Ingram, Riser, Lake Dogwood, and Smith transactions.

With respect to the Ingram transaction, Petitioner concedes that the fact findings did not go beyond the charges noticed.

With respect to the Riser transaction, the charge was "That you did pledge and deliver a savings passbook to one Ed Riser as security for a $40,000.00 loan after which you filed an affidavit with American Bank and Trust stating that you had lost or misplaced your passbook and withdrew the proceeds from your account, which destroyed the security you had previously given; . . ." Petition for Certiorari, p. 17.

The Trial Court's findings with respect to this transaction are set forth in the Appendix of the Petitioner's Petition for Writ of Certiorari, pages 30-33. The Trial Court's findings are entirely responsive to the charge noticed and include specific findings that Petitioner made a false statement under oath by passing an affidavit of lost passbook to American Bank and Trust Company. The Petition for Certiorari rather skirts the fact that Petitioner was found guilty of filing a false affidavit, as charged. The State Supreme Court stated that all findings were supported by clear and convincing evidence .... S. C. ...., 230 S. E. (2d) 442 (1976).

The fact that the Court found the entire transactions surrounding the filing of the false affidavit constituted "overall underhanded conduct" in no way vitiates the substantive finding that Petitioner filed a false and fraudulent affidavit. It is further submitted that the filing of a false affidavit, standing alone, constitutes sufficient state grounds for the revocation of the real estate license. The fact that the judge found the entire transaction which underlay the filing of the false affidavit to be fraudulent, in addition to the specific finding relative to the false affidavit, does not constitute a due process denial. This is so especially since the fact findings clearly encompass the facts alleged in the charge.

Very similar considerations apply to the trial Judge's treatment of the Lake Dogwood transaction. The charge against Petitioner was "That on May 30, 1972, you falsely represented to representatives of Lake Dogwood Associates, Inc., and to Leesburg Associates that in consideration of an extension of time within which to close a real estate transaction, you would pay the sum of Thirty Thousand and No/100 ($30,000.00) dollars, at which time you knew or should have known that insufficient funds were available to you to honor your commitment, all in violation of Section 56-1545.16, Code of Laws of South Carolina; . . ." Petition for Certiorari, p. 16.

The Court's finding of fact, Petitioner's Appendix, page 33-35, clearly demonstrates that petitioner issued a Thirty Thousand and No/100 ($30,000.00) Dollar check which, the evidence showed clearly and convincingly, was dishonored and constituted a false representation. This fact finding is quite clear in the Judge's Order, in the second two paragraphs of page 34 of the Petition.

The Judge included four other fraudulent checks which gave rise to the issuance of the Thirty Thousand and No/100 ($30,000.00) dollar check, in his findings of fact. This in no way vitiates the finding relative to the Thirty Thousand and No/100 ($30,000.00) dollar check, which finding alone would have constituted a sufficient basis for revocation of the license. The four Five Thousand and No/100 ($5,000.00) Dollar checks, and their issue, constituted an integral part of the transaction by which the Thirty Thousand ($30,000.00) dollar check was dishonored.

It is a novel proposition indeed, that a Trial Court is relegated to parroting the language of a charge in his fact findings, and that he may not explore fully the facts which gave rise to the transaction charged. This Court is concerned with fundamental fairness when it reviews questions

under the due process clause of the Fourteenth Amendment. It was not fundamentally unfair to Petitioner for the Trial Court to discuss the full transaction which gave rise to the passing of a fraudulent check nor for the Court to find that other aspects of the transaction were also fraudulent.

The Ralph Smith transaction involved the following charge: "That you did enter into a real estate transaction with one Ralph Smith, enticing him to deal with you on the basis of a financial statement which you asserted as being yours, and which reflected a net equity of $20,637,747 No/100, which financial statement was false and utilized for fraudulent purposes; the personal note referred to being unpaid, the property, the subject of the transaction, was encumbered by you with a mortgage which was allowed to be foreclosed upon; . . ." Petition for Certiorari, p. 4.

Petitioner was accused in this charge, among other things, of the fraudulent use of a financial statement. No copy of this transaction was ever admitted into evidence. But the charge also fairly includes the accusation that Petitioner encumbered real estate by mortgage and allowed it be foreclosed, to the detriment of the complaining witness. The Court's fact findings, which the Supreme Court concluded were supported by clear and convincing evidence, were that the property was mortgaged without intent of repayment. The language, "the property which the subject of the transaction was encumbered by you which was allowed to be foreclosed upon," quoted at page 5 of the Petition for Certiorari, gave adequate notice to Petitioner that he was charged with encumbering property by mortgage and letting the same be foreclosed. This is the precise finding of the Trial Court. Petition for Certiorari, Appendix, page 26 and 27.

Petitioner received adequate notice of the charges against him, and the findings of fact corresponded fairly and substantially therewith.

CONCLUSION

For all the reasons above cited, this Court should deny Petition for Writ of Certiorari.

Respectfully submitted,

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This 11th day of
May, 1977.

APPENDIX

QUESTIONS PRESENTED IN PETITIONER'S BRIEF IN THE S. C. SUPREME COURT

I

Did the Trial Court err in failing to dismiss all charges on the grounds that none of the charges involved transactions in which Appellant was acting as a Real Estate Broker and that such charges did not fall within the purview of the Statutes governing revocation of a Real Estate Broker's license? (Exception No. 1.)

II

Did the Trial Court err in considering as standards of conduct for the revocation of Appellant's Real Estate Broker's license, standards other than those set forth in Section 56-1545.16, S. C. Code of Laws, 1962, as amended? (Exception No. 2.)

III

Did the Trial Court err with respect to its findings and conclusions regarding the Ralph L. Smith transaction by finding Appellant guilty of certain misconduct with which he had not been charged nor given the opportunity to defend when the Trial Court had restricted the issues of the trial to the written charges made against Appellant and when there was no evidence to support such findings? (Exceptions No. 3, 4, 18, 19 and 20.)

IV

Did the Trial Court err in admitting in evidence the document identified as Affidavit of Lost Passbook, Plaintiff's Exhibit 5, when such document was not authenticated by any witness to its execution? (Exception No. 11.)

V

Did the Trial Court err with respect to the Edward W. Riser transaction by making findings of fact that were not supported by the record and by finding Appellant guilty of misconduct with which he was not charged and was not given notice or opportunity to defend? (Exceptions No. 10, 13, 18, 19 and 20.)

VI

Did the Trial Court err in failing to hold that the evidence conclusively showed that Appellant was not guilty of the charges made against him with respect to the Edward W. Riser transaction? (Exception No. 12.)

VII

Did the Trial Court err in regard to the Henry E. Ingram transaction by allowing Mr. Ingram to testify that Appellant orally agreed not to place any second mortgages on property conveyed from Mr. Ingram to Appellant in fee simple without any restrictions in the deed? (Exceptions No. 14 and 15.)

VIII

Was there evidence of a clear and convincing nature that the conveyance from Mr. Ingram to Appellant was not a fee simple conveyance but was a trust arrangement which Appellant fraudulently breached? (Exceptions No. 16, 17, 18, 19 and 20.)

IX

Did the Trial Court err in respect to its findings concerning the Lake Dogwood transaction by finding that the return of a $30,000.00 check for insufficient funds constituted such misrepresentations and false promises as to form a basis for revocation of Appellant's Real Estate Broker's license? (Exceptions No. 6, 7, 8, 18, 19 and 20.)

X

Did the Trial Court err in considering as evidence of misconduct the dishonor of four Five Thousand dollar checks when no charges had been made against Appellant with respect to such checks, and he had no notice or opportunity to defend such a charge? (Exception No. 5.)

XI

Did the Trial Court err in admitting in evidence the letters marked as Plaintiff's Exhibits 10, 11 and 12 over the objection that such letters were not properly authenticated and constituted hearsay evidence? (Exception No. 9.)